1992

Douglas E. Butts v. Gary Laney and Eagle Systems International : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

DOUGLAS E. BUTTS, Plaintiff and Appellant, vs. GARY LANEY and EAGLE SYSTEMS INTERNATIONAL, Defendants and Appellees.	)	Appellate Court No. 910158 92-0032-

---

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH
HONORABLE CULLEN Y. CHRISTENSEN

JEFFERY C. PEATROSS
IVIE & YOUNG
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

Nelson L. Hayes
George T. Naegle
RICHARDS, BRANDT, MILLER & NELSON
Key Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

Bob Henderson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
11th Floor
P.O. Box 4500
Salt Lake City, Utah 84145

Argument priority classification 16

IN THE SUPREME COURT OF UTAH

DOUGLAS E. BUTTS, Plaintiff and Appellant, vs. GARY LANEY and EAGLE SYSTEMS INTERNATIONAL, Defendants and Appellees.	)	Appellate Court No. 910158

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH
HONORABLE CULLEN Y. CHRISTENSEN

JEFFERY C. PEATROSS
IVIE & YOUNG
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

Nelson L. Hayes
George T. Naegle
RICHARDS, BRANDT, MILLER & NELSON
Key Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

Bob Henderson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
11th Floor
P.O. Box 4500
Salt Lake City, Utah 84145

Argument priority classification 16

TABLE OF CONTENTS

STATEMENT OF JURISDICTION..... 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW..... 1

STANDARD OF REVIEW..... 2

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 5

SUMMARY OF THE ARGUMENT..... 5

ARGUMENT..... 9

POINT I..... 9

THE TRIAL COURT ERRED IN ADMITTING DEMONSTRATIVE EVIDENCE WHICH IS IRRELEVANT AND MISLEADING.

POINT II..... 13

THE TRIAL COURT ERRED IN ALLOWING DEFENSE TO PURPOSELY SOLICIT THE INJECTION OF EVIDENCE THAT THE PLAINTIFF HAD RECEIVED WORKERS' COMPENSATION BENEFITS AS A RESULT FROM THE ACCIDENT IN QUESTION.

POINT III..... 19

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF CONDUCT INDICATING AN ADMISSION OF LIABILITY.

CONCLUSION..... 22

CERTIFICATE OF SERVICE..... 24

ADDENDUM..... 25

TABLE OF AUTHORITIES

CASES CITED

PAGE

Bibby v. Hilstrom, 260 Or. 267, 490 P.2d 161 (1971) 16

Duffek v. Vanderhei, 81 Ill. App. 3d 1078, 401 N.E. 2d 1145 (1980) 16

Gittens v. Lundberg, 284 P.2d 1115 (Utah 1955) 20

Jarrel v. Woodland Mfg. Co., 7 Ohio App. 3d 320 455 N.E. 2d 1015 (1982) 15

Johnson v. State, 636 P.2d 47, 68 (Alaska, 1981) 12

Mydlarz v. Palmer/Duncan Const. Co, 682 P.2d 695, 703 (Mont. 1984) 15

Ortiz v. State, 30 Fla. 256, 267, 11 So. 611, 613 (1892) 11

Reid v. Owens, 93 P.2d 680 (Utah, 1939) 20, 22

Robinson v. Hreison, 409 P.2d 121, 123 (Utah 1965) 13, 19

State v. Larsen, 775 P.2d 415 (Utah 1989) 2

State v. Bartley, 784 P.2d 1331 (Utah App. 1989) 2

Strandholm v. General Const. Co., 235 Or. 145, 382 P.2d 843 (1963) 16

Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1920) 2

RULES CITED

Utah Rules of Evidence, Rule 401
(1971, as amended)..... 9

Utah Rules of Evidence, Rule 402
(1974 as amended)..... 9

Utah Rules of Evidence, Rule 403
(1991)..... 9

Utah Rules of Evidence, Rule 411
(1991)..... 20

STATUTES CITED

Utah Code Ann. § 78-2-2(j)
(1953, as amended..... 1

Utah Code Ann. § 78-3-4(1)
(1953, as amended)..... 1

OTHER SOURCES

A.L.R. 2d 761 (1949)..... 20

STATEMENT OF JURISDICTION

This appeal arises from a civil action for damages alleged to have been proximately caused by the defendant's negligence.

Jurisdiction of the Fourth Judicial District Court, Utah County, from which this appeal arises is based on UTAH CODE ANN. § 78-3-4(1) (1953, as amended).

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(j) (1953, as amended).

Judgment of the trial court was entered on the 5th day of March, 1991, and Appellants' Notice of Appeal was filed with the Fourth Judicial District, Utah County, on the 2nd day of April, 1991.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in admitting demonstrative evidence which was irrelevant and misleading?

II. Whether the trial court erred in allowing defense counsel to solicit the injection of evidence that the plaintiff had received workers' compensation benefits as a result of the accident in question?

III. Whether the trial court erred in excluding evidence of conduct indicating an admission of liability because the admission was inseparably intertwined with evidence of the defendant's possession of liability insurance?

STANDARD OF REVIEW

Standard of review of evidentiary rulings by the trial court turns upon abusive discretion by the trial court where the admission or exclusion of evidence is based upon relevancy verses probative value. However, where the question of admissibility is one of law, the issue may by directly reviewed by the appellate court and reversed where the judge commits a clear error of law. (See eg. Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990); State v. Bartley, 784 P.2d 1331 (Utah App. 1989); State v. Larsen, 775 P.2d 415 (Utah 1989))

STATEMENT OF THE CASE

Subsequent to an accident involving the parties on or about the 18th day of June, 1987, at approximately one mile West of the junction of SR-189 and SR-92, in Utah County, State of Utah, the plaintiff, Douglas E. Butts, brought a claim against the defendant for personal injury and damages

which he suffered as a result of the defendant's alleged negligence.

That trial was held on February 11, 1991 through February 14, 1991. On or about August 21, 1987, the plaintiff filed the above-referenced action against the defendant. The plaintiff's complaint alleged that the resulting personal injuries and damages were proximately caused by the defendant's negligent action of crossing over the center dividing line forcing the plaintiff to swerve off the road to avoid a collision with the defendant.

On or about February 13th, 1991, the court held a hearing outside the presence of the jury, during which the court entertained oral arguments as to the admissability of certain video tapes depicting the road traveled by the parties preceding, subsequent to, and at the accident site. The court excluded certain segments of a video tape produced by Greg Duval because they did not depict the circumstances as they existed at the time of the accident, and admitted only those portions of the video tape showing sections of the road prior to the section of Cannon road involved in the accident. The admitted sections of the Duval tape were admitted as illustrative of what the circumstances were and the type of curve the parties experienced. (Ibid, at page 48, line 1-25)

During trial certain proceedings were held to decide whether the plaintiff was prejudiced by permitted questioning from defense counsel which led to the injection of evidence that the plaintiff had received workers' compensation benefits, and also whether the plaintiff should be allowed to question the defendant as to actions which indicated an admission of liability when such actions concern the defendant's possession of liability insurance. The court decided, in the former issue, that no mention of amount had been made in regards to already recovered benefits, and it was therefore not prejudicial. (See Abstracts From Transcript of Trial: Comprising proceedings had outside the presence of the jury, page 10, line 12-17). Counsel for plaintiff made a formal objection to this decision. (See Abstract From Transcript of Trial: comprising proceedings held outside the presence of the jury, page 9, line 17-22)

Furthermore, the court decided that if proposed testimony concerning the defendant's switching of liability insurance went to prove that the defendant, at the time, "knew or suspected or felt that he had some liability and was attempting to take and do something to shield him from that," that it was relevant and should be admitted. (Ibid, at page 6, line 14-22) However, the court, during proceedings on

the 13th day of February, 1991, decided that the prejudice outweighed the possible probativeness of the evidence sought to be admitted.

On March 5th, 1991 final judgment was rendered indicating no negligence on either party.

STATEMENT OF THE FACTS

On or about the 18th day of June, 1987, at approximately one mile West of the junction of Sr-189 and SR-92, in Utah County, State of Utah, the defendant, Gary Laney, drove and operated a motor vehicle traveling downhill in a southerly direction; (See Complaint, page 1, paragraph 1-3) Simultaneously, the plaintiff was traveling uphill in a northerly direction on a motorcycle. The plaintiff alleged that the defendant crossed the center dividing line at a bend in the road and in response the plaintiff swerved off the road into some rock outcroppings suffering physical injury and property damage. (See Complaint, page 2, paragraph 4 and 5)

The plaintiff's injuries necesitated multiple spinal surgeries. He was left with severe neurological impairments and a disability of whole person rating of forty-nine (49) percent. (See generally deposition of Dr. Gaufin)

The plaintiff brought a complaint for the resulting physical injury and property damage based on the alleged negligence of the defendant in crossing the center line and forcing the plaintiff to avoid head-on collision. (See generally plaintiff's complaint)

SUMMARY OF ARGUMENT

Irrelevant and misleading evidence is inadmissible and should be excluded. The Duval reconstruction video depicting the road preceding the section of road where the accident occurred was both irrelevant and inadmissable and should have been excluded as a matter of law.

The above-mentioned video tape was irrelevant in that it did not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The preceding road does not establish the fact of tightness, elevation, or visual impairments of the relevant curve.

Furthermore, the admitted video tape was misleading in that it was filmed at a different height, speed, and from a different position in the road than that which the parties actually experienced. These variations instilled in the minds of the jury a strong, distorted, and misleading impression of

what the parties actually viewed. As a matter of law, courts have excluded demonstrative evidence which is distorted and misleading.

For example, photographic evidence which is taken of a location other than the relevant scene, and used as illustrative of the actual scene, must be substantially similar to the actual location. In the case at bar the evidence of the preceding road, admitted on the grounds that it was indicative of the type of curve experienced by the parties, is not similar to the actual s-curve, and no attempt by the court was made to determine if it was substantially similar to warrant the admission of such evidence.

The second error made involves the trial court allowing defense counsel to circumvent the well established collateral source rule by pursuing a line of questioning which revealed the plaintiff's already recovered workers' compensation benefits from the relevant accident.

It is apparent from the information which defense counsel possessed concerning workers' compensation benefits that this line of questioning would elicit a response revealing already received benefits. Also, defense counsel and the court were warned that this questioning would, and in fact did, elicit the injection of damaging evidence concerning

workers' compensation benefits. Such evidence instills in the jury's minds that the injured party has already received benefits and may be undeserving of further compensation.

Finally, the trial court erred in disallowing evidence of an admission of liability because it was inseparably linked with evidence of liability insurance. There are numerous exceptions to the rule prohibiting admission of liability insurance that are established both statutorily and judicially. One such exception is that evidence as to liability insurance is admissible when such evidence is inseparably intertwined with an admission of liability. Such admissions of liability have not been restricted to oral admissions, but may included conduct which clearly indicates such an admission.

The defendant's conduct consists of a quick change of liability insurance in mid policy period just after the accident, an unfounded explanation for such a prompt switch, and an attempt to misinform as to the actual time in which the switch was made. These facts, examined closely, are an admission of liability and should not have been excluded. Disallowing the admission of such evidence hindered the plaintiff in proving his theory of the case.

For the above-mentioned reasons the plaintiff was

prejudiced and the trial court should grant a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING DEMONSTRATIVE EVIDENCE WHICH IS IRRELEVANT AND MISLEADING.

Utah Rules of Evidence state that "Evidence which is not relevant is not admissible." The courts admission of the Duval video tape depicting the road prior to the section of road where the accident occurred is irrelevant and should have been so excluded. Rule 402, Utah Rules of Evidence (1974, as amended). In addition to the irrelevancy of this section of video tape, any possible probative value was outweighed by the prejudicially misleading effect it had on the jury. Rule 403, Utah Rules of Evidence (1991). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Utah Rules of Evidence (1971, as amended).

The central fact in dispute in this case is whether the defendant did or did not cross the center line which in turn caused the plaintiff to swerve off the road and collide into some rock outcroppings.

The evidence which was admitted at trial was a video

tape of the road before the segment where the accident actually occurred, as seen from the inside of a car, at a different speed than was actually travelled by the parties, and of segments of the road that were not involved in the accident. It is clear that the section of road before the accident scene does not establish the fact of tightness, elevation, or visual impairments of the relevant curve. Hypothetically, a road could be flat for miles and then at a specific section steeply climb, or straight and then suddenly curve to the right or left. The "general characteristics" of the preceding road does not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The defendants originally sought admission of the above mentioned video, as well as another similar video, to support their theory that the plaintiff misperceived the defendant coming over the center line, because of a claimed optical illusion. Defendant's expert testified as to this optical illusion theory created by the bend in the road at the segment where the accident occurred. However, the jury was shown a video tape which was: filmed from a different elevation than that seen by the plaintiff on his motorcycle;

from a different position in the road; at a different speed than that traveled by the parties; and not the segment of the road where this proposed optical illusion occurred. The jury, in the present case, was asked to determine whether the defendant crossed the center line and was therefore negligent. Showing the jury the section of the road that was not involved in the accident misled the jury by creating, in their minds, a strongly emphasized and inaccurate picture of what the road looked like to the plaintiff, than that which the plaintiff actually perceived.

The above mentioned variations such as the difference in elevation that the video was filmed from and different sections of road than actually confronted by the parties at the time of the accident, created a perception completely different than that confronted by the parties. In Ortiz v. State, 30 Fla. 256, 267, 11 So. 611, 613 (1892), an early case that dealt with photographs taken from a distorted angle, such evidence was excluded. The court reasoned that this distorted evidence "could have been of no assistance to the jury in the case, but would have served as an agency of confusion." This same confusion occurred in the case at bar when such evidence was admitted; the segments did not aid the trier of fact, but rather confused the jury as to what the

parties actually viewed when the accident occurred. Defendant's own expert testified that an increase of as little as one foot in elevation can equate to a ten foot difference in perception. (Please Abstract from Transcript of Trial: Hearing held on February 13, page 48, line 20-25)

Furthermore, these segments of the Duval video were admitted to show the same type of curve that was involved in the accident. The court allowed this misleading evidence "as illustrative of the roadway, the type of a road, **generally the type of a curve.**" (Ibid at page 41, line 6-12) However, it has been determined in other sister states that photographic evidence which is taken of a location other than the relevant scene, and used as illustrative of that scene must be substantially similar to the actual location. In Johnson v. State, 636 P.2d 47, 68 (Alaska 1981), the court reasoned that dissimilar photographic evidence is misleading, and prejudicial, and failure to excluded such evidence is reversible error.

In the case at bar there was no effort by the trial court or defense counsel to determine whether the curves depicted in the segments of video are substantially similar to the s-curve where the accident occurred. Also, in closing arguments the defendant stressed his theory that as the

plaintiff approached the curve where the accident occurred "his tendency would be to be towards the middle of the road," and he therefore could not see approaching traffic and did not have time to see the defendant crossing over the center line and react as claimed. In emphasizing this theory, the defendant alluded to the video-taped curves in the road and changes in elevation. (See Defendant's Closing Arguments, page 7, line 10-21). This misled the jury as to what the parties actually saw, served to prejudice the plaintiff by groundlessly supporting the defendant's theory and directly contradicted the plaintiff's own testimony, which was crucial to the plaintiff's case.

II. THE TRIAL COURT ERRED IN ALLOWING DEFENSE COUNSEL TO PURPOSELY SOLICIT THE INJECTION OF EVIDENCE THAT THE PLAINTIFF HAD RECEIVED WORKERS' COMPENSATION BENEFITS FROM THE ACCIDENT IN QUESTION.

It is well accepted in this state that generally questions concerning insurance are immaterial and should not be admitted into trial. "We do not depart from our former position: that the question of insurance is immaterial and should not be injected into the trial." Robinson v. Hreinson, 409 P.2d 121, 123 (Utah 1965). Those courts who have

addressed this issue have focused their attention on the detrimental effect knowledge of the defendant having liability insurance has on the decision of a jury. It is proposed that the jury's inclination is to base their decision as to liability upon their sympathy for the plaintiff without any restraint as to the financial burden upon the defendant.

This same concern is equally applicable to the plaintiff when knowledge of injuries suffered by the plaintiff are in fact covered by insurance, or in the case at bar by workers' compensation, and evidence of already received benefits are admitted. Such knowledge eviscerates in the juror's minds the need to compensate the injured party. Also, the introduction of such a collateral source instills in the mind of the jury the further prejudicial idea that the plaintiff will be doubly compensated for his injuries. Allowing opposing counsel to introduce such evidence prejudices the plaintiff both as to liability and as to damages.

This is a case of first impression in this jurisdiction, however, some sister states have thoroughly examined whether the introduction of evidence by the defendant about the plaintiff receiving workers' compensation benefits is prejudicial, immaterial and reversible.

The Montana Supreme Court held that admission of evidence concerning workers' compensation was reversible error and warranted a new trial.

> This court has specifically determined that in a personal injury action the prejudicial impact of allowing a jury to receive evidence of plaintiff's pending workers' compensation claim vastly outweighs the probative value of such evidence. Allers v. Willis, 643 P.2d 592, 39 St. Rep. 745 (Mont. 1982) The court ruled in Allers that evidence of the workers' compensation claim was clearly inadmissable, quoting the following passage from an annotation:
>
> > Generally, it has been held to constitute error, requiring a reversal or new trial, to bring to the jury's attention the fact that the plaintiff in a personal injury or death action is entitled to workmen's compensation benefits. The courts have reasoned that such information would tend to prejudice the jury and influence their verdict, either as to liability or damages, as such information is ordinarily immaterial and irrelevant. 77 A.L.R. 2d at 1156.
>
> Admission of this evidence [evidence of received workers' compensation benefits] was reversible error and requires a new trial.

Mydlarz v. Palmer/Duncan Const. Co., 682 P.2d 695, 703 (Mont. 1984).

These are other jurisdictions which have addressed this issue and found similarly:

Jarrel v. Woodland Mfg. Co., 7 Ohio App. 3d 320, 455 N.E. 2d 1015 (1982): The court determined that the trial court erred in permitting testimony regarding the plaintiff's receipt of workers' compensation benefits for his injuries,

even for the limited purpose of proving that the plaintiff had diminished incentive to work. This evidence was elicited during cross-examination, and a new trial was granted.

Duffek v. Vanderhei, 81 Ill. App. 3d 1078, 401 N.E. 2d 1145 (1980): The court reaffirmed the states longstanding principle that "It is well established that evidence that a plaintiff filed a workmen's compensation claim or received benefits is highly prejudicial and may not be introduced in a jury trial."

Bibby v. Hilstrom, 260 Or. 267, 490 P.2d 161 (1971): The court held that it was reversible error to allow the injection of evidence as to recovered workers' compensation benefits both in pleadings and during trial. The court also cited Strandholm v. General Const. Co., 235 Or. 145, 382 P.2d 843 (1963), where the court held that intentional injection of evidence as to workers' compensation was prejudicial and reversible error.

In the instant case, while cross-examining the plaintiff, the defendant's counsel clearly sought to inject evidence about workers' compensation coverage subsequent, but related to the accident in question. (Please see Abstract From Transcript of Trial: Comprising the Cross Examination of Douglas E. Butts, page 15, line 10-25 and page 16, line 1-7)

Defense counsel asked whether the plaintiff worked for Ray Butts Construction in February of 1990 as an employee, when defense counsel knew that the plaintiff had testified under oath in deposition that he was not employed by Ray Butts Construction nor any other employer since the above mentioned accident occurred; with the exception of personal wood-working, the defendant testified that he has been unemployed since the 1987 accident. (See Plaintiff's Deposition 1, page 47, line 24 through page 48. line 10; Deposition 2, page 7, line 1-8; page 20, line 14-23; Deposition 3, page 18-20; page 20, line 12-19; page 22, line 4-7)

The plaintiff answered that he did not work for Ray Butts Construction. Defense counsel then asked the plaintiff if he had filed a workers' compensation claim during February, 1990, knowing that he had filed this claim and that it was filed in connection with the 1987 accident. (See Appendix A)

Notwithstanding defense counsel's knowledge of the Plaintiff's clearly apparent unemployed status, defense counsel's line of questioning was further disingenuous in that counsel was fully aware of the extent of the plaintiff's injuries and physical disability, and knew that his condition made it impossible, at the time the claim was filed, to

continue as an employee of Ray Butts Construction. (See Plaintiff's Deposition 2, page 7, line 1-8; page 35, line 19 through page 36, line 2; page 37, line 22-35; Deposition 3, page 5, line 3-5; page 6, line 15-23; page 11, line 7-12; page 20, line 12-19)

Plaintiff's counsel, seeing the direction and possible prejudice that could result if information as to already recovered workers' compensation benefits were to reach the jury, sought to preclude such evidence from being admitted by objecting and requesting a side bar conference as to defense counsel's line of questioning. (Please see Abstract From Transcript of Trial: Comprising the Cross Examination of Douglas E. Butts, page 15, line 10-25; Abstract From Transcript of Trial: comprising proceedings had outside the presence of the jury, page 9, line 17-22)

Defense counsel was warned by plaintiff's counsel, at side bar, that this line of questioning would inevitably elicit evidence connecting the workers' compensation claim, which defense counsel introduced, and benefits already received with the 1987 accident. The judge allowed defense counsel to continue. Having answered that he was not employed with Ray Butts Construction during February, 1990, the plaintiff was faced with the ambiguous perception created by

defense counsel's question as to whether he had filed a claim as an employee during this time. Rather than allowing himself to be perceived as dishonest, the plaintiff was compelled to answer that he had filed such a claim, but that he was unemployed during this time and the claim was filed as a residual effect of the 1987 accident. Forewarned of the information that would be, and was, elicited from this line of questioning, defense counsel purposely sought to solicit this immaterial and irrelevant information, which prejudicially and adversely affected the plaintiff. (Ibid at page 15 line 10 through page 16 line 7)

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF CONDUCT INDICATING AN ADMISSION OF LIABILITY.

The court erred in excluding evidence of defendant's change of liability insurance after the accident while still in mid-policy. Evidence as to liability insurance is generally inadmissable. See Robinson v. Hreinson, 409 P.2d 121, 123 (1965); See also Point I. However, it is well accepted that this rule is not exclusive, and different jurisdictions have legislatively or judicially established numerous exceptions.

> Notwithstanding the general rule against the introduction of evidence suggesting or implying

> that the defendant is protected by liability insurance, the suggestion of the possession of insurance **will not be avoided at the cost of suppressing evidence material to the establishment of a cause of action and the liability of a defendant** sued for damages, or to show bias or prejudice of a witness.

Annot., Admissability of evidence, and propriety and effect of questions, comments, etc. tending to show that defendant in personal injury or death action carries liability insurance, 4 A.L.R. 2d 761 (1949)(Emphasis added).

In addition to Rule 411, Utah Rules of Evidence (1991), which provides for exceptions to the above mentioned rule, the courts in this jurisdiction have addressed and accepted one other exception. Testimony showing that a defendant is covered by liability insurance is admissible when a reference to insurance is a part of an admission of liability or responsibility. Reid v. Owens, 93 P.2d 680 (1939); Gittens v. Lundberg, 284 P.2d 1115 (1955).

The above mentioned courts reasoned that the possible prejudicial impact of evidence indicating the existence of liability insurance was outweighed by the probative value of the evidence indicating admitted liability; the two of which were inseparably intertwined.

In the case at bar, the defendant changed automobile insurance from one company to another three weeks after the

relevant accident. It is the plaintiff's theory that the defendant quickly changed insurance companies to prevent the imminent repercussions of his negligence; namely, that his being at fault would lead to higher premiums or cancellation of his already high risk policy; this change was made while the defendant was in mid-policy. (See Abstract From Transcript of Trial: comprising testimony and arguments on motions held outside the presence of the jury, February 14, 1991, page 2, line 24, 25; page 3, line 1)

Initially the defendant denied having quickly switched policies after the accident, and he maintained that it was several months before he made the change. (Ibid at page 5, line 1-3) However, upon cross-examination the defendant conceded that it was three weeks rather than three months, and he also conceded that he and his wife had discussed this change during this short time. (Ibid, at page 5, line 10-15)

Plaintiff's theory is further supported by evidence which disproves the defendant's alleged motivation for switching insurance policies in such a hasty manner. The defendant claimed that he switched insurance companies because of lower premiums. While testimony did prove that the defendant's policy with Allstate, the initial policy, was

higher than the State Farm policy, it was revealed that the defendant was insured under a higher risk policy through Allstate Indemnity, an affiliate of Allstate which deals exclusively with high risk policies. (Ibid, at page 17, line 2-6)

The evidence indicates that the defendant, had he given his present insurer correct information regarding previous accidents, would not have been given a lower rate than he already possessed. Also, if his driving record was reevaluated by Allstate as being clear of any further accidents or moving violations, Allstate would have reassigned him to the lower risk company and his rates would then be less than the present State Farm policy which the defendant acquired. (Ibid, at page 18-28) This conduct, although not verbally expressed, is an admission of liability, and is so intertwined with evidence of liability insurance that it appropriately fits within the exception set forth in Reid v. Owens, 93 P.2d 680 (1939). Excluding this admission of liability clearly prejudices the plaintiff, and restricts him from presenting evidence as to the defendant's liability and warrants a new trial.

CONCLUSION

The plaintiff was prejudiced both as to liability

and as to damages by the admission of the irrelevant and misleading video segments, by the court allowing defense counsel to pursue a line of questioning which counsel knew would result in the injection of prejudicial information concerning already received workers' compensation benefits, and by the court excluding crucial evidence regarding an admission of liability by the defendant. For the above reasons, severally or cumulatively, the defendant was prejudiced and a new trial should be granted.

DATED AND SIGNED this 25th day of July, 1991.

R. PHIL IVIE
IVIE & YOUNG
Attorneys for Plaintiff/
Appellant

JEFFERY C. PEATROSS
IVIE & YOUNG
Attorneys for Plaintiff/
Appellant

CERTIFICATE OF SERVICE

I, Jeffery C. Peatross, hereby certify that on the 26th day of July, 1991, served (4) copies of the foregoing Brief of Appellant, upon Nelson Hayes and George T. Naegle of RICHARDS, BRANDT, MILLER & NELSON and Bob Henderson of SNOW, CHRISTENSEN & MARTINEQU, counsel for appellees in this matter, by mailing to him by first class mail with sufficient postage prepaid to the following address:

Nelson L. Hayes
George T. Naegle
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

Bob Henderson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place
11th Floor
P.O. Box 4500
Salt Lake City, Utah 84145

JEFFERY C. PEATROSS
Attorney for Record

ADDENDUM

I. DETERMINATIVE RULES

A. Utah Rules of Evidence, Rule 401 (1971, as amended)

B. Utah Rules of Evidence, Rule 402 (1974 as amended)

C. Utah Rules of Evidence, Rule 403 (1991)

D. Utah Rules of Evidence, Rule 411 (1991)

II. DETERMINATIVE STATUTES

A. Utah Code Ann. § 78-3-4(1) (1953, as amended)

B. Utah Code Ann. § 78-2-2(j) (1953, as amended)

III. APPENDIX A

IV. JUDGMENT ON THE VERDICT

V. NOTICE OF APPEAL

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. State v. Peterson, 560 P.2d 1387 (Utah 1977).

NOTES TO DECISIONS

ANALYSIS

Effect of remoteness.
Cited.

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (Utah 1984).

Cited in State v. Gray, 717 P.2d 1313 (Utah 1986); State v. Nickles, 728 P.2d 123 (Utah 1986); Meyers v. Salt Lake City Corp., 747 P.2d 1058 (Utah Ct. App. 1988); Fisher ex rel. Fisher v. Trapp, 748 P.2d 204 (Utah Ct. App. 1988); Belden v. Dalbo, Inc., 752 P.2d 1317 (Utah Ct. App. 1988); State v. Worthen, 765 P.2d 839 (Utah 1988); State v. Maurer, 770 P.2d 981 (Utah 1989); State, In re R.D.S., 777 P.2d 532 (Utah Ct. App. 1989); Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990).

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 78.

United States v. Downing: Novel Scientific Evidence and the Rejection of Frye, 1986 Utah L. Rev. 839.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Advisory Committee Note. — The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word "statute" the words "Constitution of the United States" have been added.

Compiler's Notes. — The Utah rule also adds the words "or the Constitution of the state of Utah" to Rule 402, Uniform Rules of Evidence (1974).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402 [Rule 403]. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Compiler's Notes. — The bracketed reference to "Rule 403" in the Advisory Committee Note to Rule 403 was inserted because Rule 402 does not refer to "unfair prejudice" and Rule 403 appears to be the correct reference.

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Advisory Committee Note. — This rule is the federal rule, verbatim. The provisions of this rule are comparable to Rule 54, Utah Rules of Evidence (1971) and case law. Cf. Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965); Reid v. Owens, 98 Utah 50, 93 P.2d 680 (1939).

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals [Effective until January 1, 1988].

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Constitution and not prohibited by law.

(2) The district court judges have power to issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) Under the general supervision of the presiding officer of the Judicial Council and subject to policies established by the Judicial Council, cases filed in the district court, which are also within the concurrent jurisdiction of the circuit court, may be transferred to the circuit court by the presiding judge of the district court in multiple judge districts, or the district court judge in single judge districts. The transfer of these cases may be made upon the court's own motion or upon the motion of either party for adjudication. When an order is made transferring a case, the court shall transmit the pleadings and papers to the circuit court to which the case is transferred. The circuit court has the same jurisdiction as if the case had been originally commenced in the circuit court and any appeals from final judgments shall be to the Court of Appeals.

(4) Appeals from the final orders, judgments, and decrees of the district court are under §§ 78-2-2 and 78-2a-3.

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the Board of State Lands and Forestry;

(iv) the Board of Oil, Gas, and Mining; or

(v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

J. BOX 30180
.T LAKE CITY UT 84130
L 371-7425

14472629884

5 BC/BS PROV. NO.	6 FEDERAL TAX NO.	7 MEDICARE NO.	8 MEDICAID NO.	9
30	942854057	460001	870269232162	

PATIENT'S LAST NAME / FIRST NAME / INITIAL	11 PATIENT'S ADDRESS	CITY	STATE	ZIP
TTS, DOUGLAS E	3965 N 480 E	PROVO	UT	84604

TH DATE	13 SEX	14 MS	15 ADMISSION DATE	16 HR	17 TYPE	18 SRC	19 A.H.	20 D.H.	21 STAT	22 STATEMENT COVERS PERIOD FROM	THROUGH	23 COV.D.	24 N-C.D.	25 C-I.D.	26 I-H.D.	27
1450	M	M	022690	14			14	14	00	022690	022690					010921

OCCURRENCE	29 OCCURRENCE	30 OCCURRENCE	31 OCCURRENCE	32 OCCURRENCE	33 OCCURRENCE SPAN
DATE	CD / DATE	CD / DATE	CD / DATE	CD / DATE	CD / FROM / THROUGH
022690					

TTS, DOUGLAS E
35 N 480 E
OVO UT 84604

CONDITION CODES 35	36	37	38	39	BLOOD RECORD (PINTS) 40 FURN	41 REPL	42 NOT RP.	43 DED.	44 SP. PROG.	46
02										

48 VALUE CD / AMT	47 VALUE CD / AMT	48 VALUE CD / AMT	49 VALUE CD / AMT

SCRIPTION	51 R. CODE	52 S. UNITS	53 TOTAL CHARGES	54	55	56
X-RAY	320	1	44 95			
ERG ROOM	450	1	33 45			
AL	001	2	78 40			

ER	58 REL INFO	59 ASG BEN	60 DEDUCTIBLE	61 CO-INSURANCE	62 EST. RESPONSIBILITY	63 PRIOR PAYMENTS	64 EST AMOUNT
USTRIAL-WORKERS' COMP	Y	Y			78 40		78
ST	Y	Y					

DUE FROM PATIENT

RED'S NAME	66 SEX	67 P.REL	68 CERT.-SSN-HIC.-ID. NO.	69 GROUP NAME	70 INSURANCE GROUP NO.
TTS, DOUGLAS E 101450	M	1	568769965	BUTTS CONSTRUC	
TTS, DOUGLAS E 101450	M	1	568769965	RAY BUTTS	

72 ESC	73 EMPLOYER NAME	74 EMPLOYEE ID.	75 EMPLOYER LOCATION
3	UNEMPLOYED		0
3	UNEMPLOYED		0

CIPAL AND OTHER DIAGNOSES DESCRIPTIONS		77 PRIN CODE	OTHER DIAGNOSES CODES 78	79	80	81
TUSION OF UPPER ARM	00281	92303	E916	E8493		

83 PRINCIPAL AND OTHER PROCEDURES DESCRIPTIONS	84 PRINCIPAL PROCEDURE CD / DATE	85 OTHER PROCEDURE CD / DATE	86 OTHER PROCE CD / DA

PSRO UR DATA 87 APP FROM	88 APP THROUGH	89 GRC	91 TREATMENT AUTH	92 ATTENDING PHYSICIAN ID. 04483 GADD, WENDELL	93 OTHER PHYSICIAN ID.

ARKS | VERIFIED N-C. STAY DATES | FOR INTERMEDIARY USE ONLY

NELSON L. HAYES (A1433)
GEORGE T. NAEGLE (A5001)
RICHARDS, BRANDT, MILLER & NELSON
Attorney for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

DOUGLAS E. BUTTS, Plaintiff, vs. GARY LANEY, Defendant.	JUDGMENT ON THE VERDICT Civil No. CV-87-1954 Hon. Cullen Y. Christensen

This matter, having come on regularly before the Honorable Cullen Y. Christensen, and the Honorable Cullen Y. Christensen having found that this matter was tried to a jury between the dates of February 11, 1991 and February 14, 1991, and the plaintiff having been represented by R. Phil Ivie and Jeffery Peatross, and the defendant having been represented by Nelson L. Hayes and George T. Naegle and that the jury returned a special verdict answering questions 3 and 4 as follows:

3. At the time and place of the incident in question and under the circumstances as shown by the evidence, was Gary Laney negligent?

Yes _____ No X

4. Was such negligence a proximate cause of the plaintiff's injuries?

Yes _____ No X

The Court, having reviewed the special verdict form and for good cause showing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff Douglas E. Butts' cause of action against the defendant Gary Laney be dismissed with prejudice and upon the merits and that a verdict of no cause of action be entered against the plaintiff Douglas E. Butts.

2. That the defendant Gary Laney, be awarded costs in the amount of $ _____.

DATED this 5 day of March, 1991.

BY THE COURT:

Cullen Y. Christensen

THE HON. CULLEN Y. CHRISTENSEN
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed by first class, postage prepaid, this 21st day of Feb., 1991 to the following:

R. Phil Ivie
Jeffery C. Peatross
IVIE & YOUNG
Attorneys for Plaintiff
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

Robert H. Henderson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

R. PHIL IVIE, #3657
JEFFERY C. PEATROSS, #5221
IVIE & YOUNG
48 NORTH UNIVERSITY AVENUE
P. O. BOX 672
PROVO, UTAH 84603
375-3000

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

DOUGLAS E. BUTTS, Plaintiff and Appellant, vs. GARY LANEY and EAGLE SYSTEMS INTERNATIONAL, and EAGLE MARKETING CORPORATION, Defendants and Appellees.	:	NOTICE OF APPEAL Civil No. CV-87-1954 Judge Cullen Y. Christensen

COMES NOW the plaintiff and appellant, Douglas E. Butts, by and through his attorney R. Phil Ivie, and appeals to the Utah Supreme Court the final judgment rendered in the above-entitled matter on the 5th day of March, 1991.

The appeal is taken from the entire judgment.

DATED AND SIGNED this 2nd day of April, 1991.

R. PHIL IVIE
IVIE & YOUNG
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Appeal, with postage prepaid thereon, this 2nd day of April, 1991, to the following:

Nelson L. Hayes
Richards, Brandt, Miller
& Nelson
50 South Main #700
P.O. Box 2465
Salt Lake City, UT 84110

Robert Henderson
Snow, Chirstensen
& Martineau
10 Exchange Place
Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145

Nancy J. Monson

NANCY J. MONSON
Secretary